No. 12-1490

IN THE
Supreme Court of the United States

TIM MOOSE, *Petitioner*,
v.
WILLIAM SCOTT MACDONALD, *Respondent*.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

Brief *Amicus Curiae* of Virginia Delegate Bob Marshall, Virginia Senator Dick Black, Public Advocate of the United States, U.S. Justice Foundation, Institute on the Constitution, The Lincoln Institute for Research and Education, The Abraham Lincoln Foundation for Research and Education, Conservative Legal Defense and Education Fund, and Policy Analysis Center in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

Delegate Bob Marshall is a senior member of the Virginia House of Delegates. Senator Dick Black is a member of the Virginia State Senate.

Public Advocate of the United States and The Abraham Lincoln Foundation for Public Policy Research are nonprofit social welfare organizations, exempt from federal income tax under section 501(c)(4) of the Internal Revenue Code ("IRC"). U.S. Justice Foundation, The Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under IRC section 501(c)(3), and are public charities. Institute on the Constitution is an educational organization.

The organizational *amici* were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Several of these *amici* submitted an *amicus curiae* brief in Lawrence v. Texas before this Court.[2]

SUMMARY OF ARGUMENT

The Fourth Circuit decision that the Virginia "crimes against nature" statute is unconstitutional rests entirely upon the assumption that this Court's decision in Lawrence v. Texas, which "rendered invalid" the Texas anti-sodomy statute, erased the Virginia statute from the Commonwealth's criminal code. Thus, the Fourth Circuit ruled that, unless the Virginia Assembly enacts a new statute that conforms to the Lawrence opinion, Virginia officials cannot employ the state's "crimes against nature" statute to prosecute a 47-year-old man for solicitation of a 17-year-old girl to perform oral sodomy. The Fourth Circuit's assumption about the legal impact of Lawrence and its application to the Virginia law is erroneous.

First, the Fourth Circuit assumed that the Lawrence decision repealed the Texas anti-sodomy statute, and along with it the Virginia "crimes against nature" law. This assumption is incorrect, having been based upon a misconception of the nature of judicial power, and an intrusion upon the prerogative of the state legislatures. By its ruling unconstitutional of the Texas anti-sodomy law, the Court did not repeal that statute, much less the Virginia "crimes against nature" statute. Rather, armed only with judicial

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[2] http://www.lawandfreedom.com/site/constitutional/Lawrence.pdf

power, not legislative power, the Court pronounced only its "judgment" that the Texas law was unconstitutional. Binding only upon the parties to the case, the Lawrence decision did not — indeed it could not — nullify any state law, erasing it from its criminal code.

Second, the Fourth Circuit assumed that Lawrence required not only the Texas legislature to change its anti-sodomy law, but also the Virginia General Assembly to change its "crimes against nature" statute to conform with the Lawrence opinion. That assumption is patently false. The court order in Lawrence was addressed solely to the Texas appellate court to which it had issued its writ of certiorari and to which it remanded the case for further proceedings. To read into the Lawrence opinion an implied message to any other state legislative body would be tantamount to an advisory opinion, contrary to this Court's jurisdiction which is limited to cases or controversies by Article III, Section 2.

Underpinning these two false assumptions about the nature of judicial power is the further assumption that the Lawrence opinion is the law of the land. Just because it is the province and duty of the judicial department to say what the law is, it is a mistake to assume that whatever this Court, or any other court, says is law.

With respect to the exercise of the power of judicial review, the Lawrence opinion is deeply flawed. Instead of conforming its opinion to the original meaning of the due process text, the Court conformed

that text to its presumption that "[l]iberty presumes an autonomy of self ... expression, [including] certain intimate conduct." Moreover, the Lawrence decision presupposes an "elasticity" of constitutional meanings, subject to judicial definition based on "emerging awareness" of liberties unknown to the framers of the Fourteenth Amendment, but purportedly revealed to judges engaged in searching out the meaning of laws. Such an evolutionary jurisprudence directly contradicts the original understanding, expressed in Marbury v. Madison, that the Constitution embraced permanent principles, not norms that change with changing times as mediated and adopted by judges.

ARGUMENT

This is a most uncommon case. The Fourth Circuit panel employed a tortured path of legal logic to allow it to do indirectly what it would never have the temerity to do directly — decriminalize the sexual solicitation of a minor by an adult. Its decision was predicated entirely on its belief that the Supreme Court in Lawrence had the authority and power to erase the "crimes against nature" statute from the laws of Virginia, and that it had in fact exercised that power in 2003. The fact that this Court had no such power is demonstrated in section I, *infra*. The fact that the Lawrence Court never purported to exercise that power has been recognized by all of the other circuit courts which have addressed this issue, as effectively documented in the petition. Pet. Cert., pp. 22-27. Lastly, the opinion of the court of appeals went well beyond the holding in Lawrence v. Texas, and in so

doing, revealed deep flaws in Lawrence, as discussed in section II, *infra*.

I. The Fourth Circuit Wrongfully Assumed that Lawrence v. Texas Invalidated Virginia's "Crimes Against Nature" Statute.

A. The Fourth Circuit Opinion Rests upon the Assumption that Lawrence v. Texas "Rendered Invalid" the Virginia "Crimes Against Nature" Statute.

As the Fourth Circuit opinion has acknowledged, 47-year-old William Scott MacDonald's conviction for soliciting the 17-year-old Amanda Johnson to commit a felony rests upon his solicitation of the commission of an act of oral sexual intercourse in violation of the Virginia "crimes against nature" statute. *See* MacDonald v. Moose, 710 F.3d 154, 155-56 (4th Cir. 2013). According to the Fourth Circuit, MacDonald's argument that he has been unconstitutionally prosecuted succeeds because the U.S. Supreme Court ruled in Lawrence v. Texas[3] that the Texas anti-sodomy law "facially violates the Due Process Clause of the Fourteenth Amendment." *See* MacDonald, 710 F.3d at 156. That ruling, in turn, was based upon the further premise that:

> In *Lawrence*, the Supreme Court plainly **held** that **statutes** criminalizing private acts of consensual sodomy between adults are

[3] 539 U.S. 558 (2003).

> inconsistent with the protections of liberty assured by the Due Process Clause.... [*Id.* at 163 (emphasis added).]

Thus, the Fourth Circuit concluded that, by rendering invalid the Texas statute, Lawrence invalidated the Virginia anti-sodomy statute, notwithstanding the dramatically different facts, and notwithstanding that Virginia was not a party to the Texas sodomy case.

B. The Fourth Circuit's Assumption that Lawrence Invalidated Virginia's "Crimes Against Nature" Statute Is False.

Recounting MacDonald's claims in both the federal district court below[4] and in the Virginia state courts, the Fourth Circuit has observed that MacDonald has repeatedly argued that Lawrence invalidated not only the Texas anti-sodomy statute, but "all state statutes that prohibit 'consensual sodomy between individuals with the capacity to consent.'" *See* MacDonald, 710 F.3d at 157. According to MacDonald, because of Lawrence, the Virginia law was "invalidated ... *in toto*,"[5] that is, totally erased from the statute books. Thus, MacDonald has argued that any attempt by the State's executive branch to apply the "crimes against nature" statute to criminalize his behavior is tantamount to "Virginia's judicial rewriting of the anti-sodomy provision." *Id.*, 710 F.3d at 161.

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[4] MacDonald, 710 F.3d at 156.

[5] MacDonald, 710 F.3d at 160.

The Fourth Circuit emphatically agreed, asserting:

> The legal arm of the Commonwealth cannot simply wave a magic wand and decree by fiat conduct as criminal, in usurpation of the powers properly reserved to the elected representatives of the people. [*Id.*, 710 F.3d at 163.]

The Fourth Circuit panel reiterated this conclusion twice more, dismissing Justice Kennedy's own list of factual situations deemed outside the scope of the Lawrence holding, and calling them "ruminations concerning the circumstances under which a state might permissibly outlaw sodomy, [which] no doubt contemplated deliberate action by the people's representatives, rather than by the judiciary." *Id.* at 165. Thus, the panel contended that since the Virginia General Assembly has not acted, there is no room for "judicial reformation" of a dead statute. *See id.* at 165-66.

This is a remarkable panel opinion. First, there is nothing in the Lawrence opinion that even hints that the Court "contemplated deliberate action by the people's representatives, rather than by the judiciary." To the contrary, the Lawrence Court issued an order pursuant to its having granted a writ of certiorari to the Fourteenth District Court of Appeals of Texas. *See* Lawrence, 539 U.S. at 558. Accordingly, the Court issued an order remanding the case to that Texas appellate court to conduct "further proceedings not inconsistent with this opinion." *Id.* at 579. If the Court had a message for the Texas legislature, it had

available to it the power to order a stay of mandate for a period of time within which the Texas legislature might act. *See, e.g.,* Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) ("[W]e order our mandate stayed for 180 days to allow the Illinois legislature to craft a new gun law that will impose reasonable limitations, consistent with the public safety and the *Second Amendment* as interpreted in this opinion, on the carrying of guns in public.")[6]

Second, even more remarkably, the Fourth Circuit assumes that the Supreme Court in Lawrence sent an implied message not just to the Texas legislature, but to the Virginia General Assembly — even though Virginia was not a party to the case. Such a message would have been tantamount to an unsolicited advisory opinion, completely outside the purview of the judicial power vested in it by Article III, Section 2, and limited to "cases" or "controversies." *See* Muskrat v. United States, 219 U.S. 346, 361 (1911) ("[J]udicial power ... is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.")

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[6] It is instructive that Judge Posner did not order the Illinois legislature to do anything. Instead, by stayed the court's mandate, "remand[ing] [the two cases] to their respective district courts for the entry of declarations of unconstitutionality and permanent injunctions" (Madigan, 702 F. 3d at 942), the state legislature was allowed time to act if it chose to do so.

C. The Fourth Circuit's Assumption of Invalidity Constitutes an Unconstitutional Usurpation of Power.

While purporting to defer to the state legislature, the Fourth Circuit failed to recognize that, by concluding the Virginia "crimes against nature" statute was completely invalidated by Lawrence, it has intruded upon the state legislative prerogative to decide whether it would conform its statutes to square with the Court's opinion about the statute of another state, or leave it on the books should the Court change its mind and overrule Lawrence, as it had just overruled Bowers v. Hardwick, 478 U.S. 186 (1986). *See* MacDonald, 710 F.3d at 163.[7]

In 1923 the U.S. Supreme Court held the District of Columbia minimum wage law to be unconstitutional,[8] only to reverse itself 13 years later.[9] The Attorney General advised the President of the United States that Congress need not reenact the D.C. minimum wage law, because the 1927 ruling simply suspended enforcement, explaining:

> The decisions are practically in accord in holding that the **courts have no power to**

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[7] In fact, the Virginia General Assembly exercised legislative judgment in choosing to leave its "crimes against nature" statute on the books, even in the aftermath of Lawrence.

[8] Adkins v. Children's Hospital, 261 U.S. 525 (1923).

[9] West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

> **repeal or abolish a statute**, and that notwithstanding a decision holding it unconstitutional a statute continues to remain on the statute books. [39 Ops. Atty. Gen. 22 (1937) (emphasis added).]

In accord with this view is distinguished law professor and constitution scholar, Gerald Gunther, who has commented that "a law held unconstitutional in an American court is by no means a nullity...." G. Gunther, Constitutional Law 28 (12th ed. 1991). The Fourth Circuit has claimed to the contrary, asserting that, unless and until the Virginia Assembly "enact[s] a statute specifically outlawing sodomy between an adult and an older minor," the Virginia anti-sodomy statute is a dead letter. *See id.*, 710 F.3d at 165.

The Fourth Circuit has misconceived the nature of judicial power vested in it and in this Court by the United States Constitution. As Alexander Hamilton wrote in *The Federalist No. 78*, the judiciary "can take no active resolution whatever ... hav[ing] neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." *Id.*, The Federalist at 402 (G. Carey & J. McClellan, eds., Liberty Fund: 2001). Additionally, the scope of judicial power is limited to "cases" or "controversies," and thus its exercise binds only the parties to the case. *See* Lincoln's First Inaugural Address, Mar. 4, 1861, 6 Messages and Papers of the Presidents 5 (J. Richardson, ed.: 1900).

In Lawrence, the Supreme Court issued an order reversing "[t]he judgment of the Court of Appeals for the Texas Fourteenth District," not an order nullifying all Texas-type anti-sodomy statutes.[10] *Id.*, 539 U.S. at 579. While the Lawrence Court did discuss the constitutionality of the Georgia anti-sodomy law in the process of reconsideration of Bowers v. Hardwick, the Court's decision to overrule Bowers did not yield an order addressed to any Georgia court or other state official. Rather, the Lawrence Court simply remanded the "case ... for further proceedings [in the Texas appeals court] not inconsistent with this opinion." *Id.*, 539 U.S. at 579. Thus, the Court's order in Lawrence was binding only on the parties to the case and, even then, only binding by force of "judgment," wholly "depend[ent] upon the aid of the executive arm even for the efficacy of its judgments." *See Federalist No. 78,* The Federalist at 402.

D. The Fourth Circuit's Unconstitutional Projection of Judicial Power Calls for the Exercise of this Court's Supervisory Jurisdiction.

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[10] Even in Roe v. Wade, where the Court ruled that "[a] state criminal abortion statute of the current Texas type ... is violative of the Due Process Clause of the Fourteenth Amendment," the Court did not issue an order to any State official, other than the Texas court below to which it had issued its writ of certiorari, and even then it was on the assumption that "the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional." *Id.*, 410 U.S. 113 at 164, 166 (1973).

The Fourth Circuit cites no authority for its assumption that a ruling by this Court that a Texas statute violates the Constitution "utterly excises"[11] a similar Virginia statute from the Code of Virginia. Such an extravagant claim of power calls for convincing analysis and authoritative support. Since none has been forthcoming, it calls for the exercise of this Court's supervisory power on an issue of great importance in the administration of the judicial department's powers and duties under judicial review. While it may be "emphatically the province and duty of the judicial department to say what the law is,"[12] the courts must be careful not to assume that whatever they say is law. After all, the Lawrence Court itself claimed that the Court had mistook the law in Bowers v. Hardwick. And, if so, it may well have mistook the law in Lawrence for, as Justice Kennedy wrote in 2003 in support of Lawrence, if "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.... As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." According to Lawrence, what may appear to a majority of the justices in 2003 to be a barrier to freedom may turn out, to a majority of justices in 2020, to be a key to freedom.

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[11] Pet. Cert. at 11.

[12] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

II. The Fourth Circuit Improperly Applied Lawrence v. Texas, Revealing Flaws in that Decision.

A. The Decision of the Court of Appeals Goes beyond the Holding of Lawrence.

The circuit court below concluded that it felt "constrained to vacate the district court's judgment and remand ... on the ground that the anti-sodomy provision facially violates the Due Process Clause of the Fourteenth Amendment." MacDonald, 710 F.3d at 154. Yet the circuit court reached its decision concerning the constitutionality of Virginia's "crimes against nature" statute without any analysis whatsoever as to whether that statute, or its application to the facts of this case, comports with the text of the U.S. Constitution.

Indeed, the Fourth Circuit knew it was moving beyond the holding in Lawrence. The circuit court summarized the Lawrence holding as follows: "statutes criminalizing private acts of **consensual** sodomy **between adults** are inconsistent with the protections of liberty assured by the Due Process Clause of the Fourteenth Amendment...." MacDonald, 710 F.3d at 163 (emphasis added). The Fourth Circuit reveals that it did not believe that Lawrence even addressed, and certainly did not invalidate, state crimes involving minors — such as those proscribed by the Virginia "crimes against nature" statute. Only by employing its statute erasure theory could the Fourth Circuit ground its decision.

The Fourth Circuit was not even consistent in its analysis. If the court of appeals truly believed that the entire Virginia "crimes against nature" statute had been erased by Lawrence, it could not have limited its decision to leave in effect that same statute's prohibition of "bestiality by criminalizing the carnal knowledge 'in any manner [of] any brute animal'" on the theory that it was "not challenged in this proceeding...." *See* MacDonald, 710 F.3d at 156 n.2. Legalizing bestiality must have been considered a step too far, and therefore the Fourth Circuit adopted the view that a statute can be erased for one purpose, while being preserved for another which the judges support.

Additionally, the Fourth Circuit revealed that the Lawrence decision was limited, when it postulated that "the Virginia General Assembly might be entitled to enact a statute specifically outlawing sodomy between an adult and an older minor" but stated that "it has not seen fit to do so." MacDonald, 710 F.3d at 165. The circuit court does not explain how the General Assembly would have had foreknowledge of the circuit court's statutory erasure theory, for otherwise there would have been no reason for the Virginia General Assembly to enact yet another statute to criminalize what its "crimes against nature" statute has done since enactment.[13]

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[13] If Lawrence truly invalidated not only the Texas anti-sodomy statute but other state statutes, neither the Supreme Court nor the Fourth Circuit has given any guidance as to how similar such a statute must be: identical, substantially similar? What if it encompasses a broader range of behavior — or a more narrow

B. The Court's Decision in Lawrence v. Texas Was Deeply Flawed.

Before the holding in Lawrence is allowed to be extended even further, it is necessary to examine the deeply flawed nature of the Lawrence decision, which presents perhaps the quintessential illustration of a judge-created, extra-constitutional "right"; one that has been "placed in the Constitution" but which "cannot be found there."[14]

It is said that when lawyers do not have the facts, they argue the law, and when they do not have the law, they argue the facts. Similarly, when judges cannot find support for their positions in constitutional text, they sometimes wax poetic. One searches for a "any fixed star in our constitutional constellation"[15] in the Court's introduction to its opinion in Lawrence:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not

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range? What if its application is different for some reason, based on other state laws or jurisprudence, or if (as here) it is applied to facts and circumstances not yet contemplated by — much less briefed and argued to — any court?

[14] *See generally* Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics, 2d ed., Yale Univ. Press (1968), p. 1 (in addressing the power of judicial review).

[15] West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943).

> omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions. [Lawrence, 539 U.S. at 562 (Kennedy, J.).]

From this lyrical beginning, this Court's decision in Lawrence reached its desired result, never pausing along the way to even consider the Framer's view of the Due Process Clause[16] of the Fourteenth Amendment. Neither the text nor the context of the Fourteenth Amendment was analyzed. There is no objective method to determine which are the "certain" intimate relations which are protected rights. Whereas "due process of law" was once thought to have the core meaning of "law of the land" provisions dating back to the Magna Carta, limiting "the substance of executive or judicial action by requiring it to be

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[16] This Court's efforts to invest the Fifth Amendment's "Due Process Clause" with new meanings in order to strike down statutes had an ignominious beginning in Dred Scott v. Sandford, 60 U.S. 393 (1857), holding that "an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he ... brought his property into a particular Territory of the United States ... could hardly be dignified with the name of due process of law." *Id.* at 450.

grounded in law,"[17] that clause is now used elastically to justify judicial action grounded in no law whatsoever.

Indeed, the Lawrence Court's analysis began not with constitutional text, but with its own past pronouncements. Griswold v. Connecticut, 381 U.S. 479 (1965), was said to be based on the "right to privacy," a term not found in the constitution. Lawrence at 564. The Court then moved on to Eisenstadt v. Baird, 405 U.S. 438 (1972), which states: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion.... as the decision whether to bear or beget a child." *Id.* at 453. The analytical problem here is that the "right of privacy" does not mean anything, or at least nothing specific. It is impossible to argue against bald assertions about the meaning of judicially invented phrases not found in the Constitution. Lastly, the Lawrence court explains how this "right of privacy" led to this court's decision in Roe v. Wade, another recognition of what the court asserted to be a "spatial freedom...." Lawrence, 539 U.S. at 565.

Of course, an invented phrase must have an invented meaning. Since the phrase "right of privacy" has no independent meaning, its meaning can be

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[17] Edwin Meese III, ed., The Heritage Guide to the Constitution, Heritage Foundation (2010), p. 394.

invested with the personal preferences of judges.[18] Analyzing and attempting to apply the phrase "right of privacy" as though it were constitutional text constitutes the height of legal folly, only giving the appearance of judicial reasoning.[19]

Based on this subjective jurisprudential pedigree, it was not surprising that the Lawrence Court gave the Due Process Clause a meaning that, no doubt, would have shocked the conscience of the overwhelming majority of Members of Congress who voted for the Fourteenth Amendment, and the state legislators who ratified it. Indeed, the meaning of the Due Process Clause was only addressed by the Lawrence Court in explaining that it is not binding, because the Court sensed:

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[18] It cannot be argued that a "right of privacy" was on the minds of the framers or ratifiers of the Fourteenth Amendment, because that so-called right is said to have had its origins in an article by Samuel D. Warren and future U.S. Supreme Court Justice Louis Brandeis, The Right To Privacy, IV HARVARD LAW REVIEW, No. 5 (1890), not published until 22 years after the amendment's ratification in 1868.

[19] "Disregard for the text of laws ... in favor of the decider's discretion has permeated our Ruling Class from the Supreme Court to the lowest local agency.... [I]t has become conventional wisdom among our Ruling Class that they may transcend the Constitution while pretending allegiance to it.... Perfunctory to the point of mockery, this constitutional talk was to reassure the American people that the Ruling Class was acting within the Constitution's limitations.... But if government can decide that the constitution contains things that it does not, and allows things that it forbids, then adieu to the rule of law." Angelo Codevilla, The Ruling Class: How They Corrupted America and What We Can Do About It, Beaufort Books, (2010) pp. 42, 45.

> an **emerging awareness** that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. "History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." [Lawrence, 539 F.3d at 572 (citations omitted) (emphasis added).]

If "emerging awareness" is to become the standard for interpreting constitutional text, the power of the Court to pick and choose and then to rely upon on whatever strikes its fancy to support its opinions is unlimited. Indeed, it is not at all surprising that the Court would even import recent actions of the British Parliament and European Court of Human Rights as aids to "interpret" the U.S. Constitution. *See id.* at 572-73, 576-77.

The Lawrence Court demeaned both the Fourteenth Amendment's text and a legitimate search for authorial intent of the Framers in its concluding ode to evolutionary progress:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the

> Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom. [*Id.* at 578-79.][20]

Rather than demonstrating fidelity to a constitutional text, the Court explains why the Supreme Court is not bound to follow it. Rather than demonstrating that even the U.S. Supreme Court is under the authority of the Constitution, the Lawrence Court joined Chief Justice Charles Evans Hughes in asserting that "[w]e are under a Constitution, but the Constitution is what the judges say it is...."[21] Rather than reflecting an evolutionary process, the decision reveals to many Americans that the United States is

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[20] Lawyers, too, find the evolutionary approach in Lawrence to be a most convenient vehicle to invent new rights out of the vanity of their imaginations, without regard for any written text, as illustrated by a recent oral argument before this Court:

> Justice Scalia: When did it become unconstitutional to exclude homosexual couples from marriage? 1791? 1868, when the Fourteenth Amendment was adopted? ...
>
> Mr. [Ted] Olson: It was [un]constitutional when we – as a culture determined that sexual orientation is a characteristic of individuals that they cannot control .... There's no specific date in time. This is an evolutionary cycle. [Oral Argument, March 26, 2013, Hollingsworth v. Perry, 570 U.S. ____, 186 L.Ed.2d 768 (2013) pp. 36-37.]

[21] Charles Evans Hughes, The Supreme Court of the United States, p. 120 (Columbia Univ. Press, 7th ed., 1928).

devolving, moving into a stage of history where every man does what is right in his own eyes.[22]

The root cause of the conflict between the Fourth Circuit and the Virginia "crimes against nature" statute, then, is the evolutionary jurisprudence underlying the decisions of this Court in the exercise of its power of judicial review. Contrary to the original understanding of the power of the courts to assess the constitutionality of statutes enacted by a legislative body elected by the people, the Lawrence Court did not search the due process text for "principles" that the people "designed to be permanent," binding on all branches of the government, including the judiciary. *See* Marbury v. Madison, 5 U.S. at 176-80. Instead, it construed the due process guarantee not as a limitation upon its powers, but as a grant of power to ignore the original meaning of the text, to free itself from constitutional restraint.

In barring the conviction of an adult sexual predator for the solicitation of a minor for immoral purposes, the Fourth Circuit, *sub silentio*, has simply positioned itself even further on the evolutionary cycle than the Lawrence Court — just a decade ago — was willing to go. *See id.* at 578 ("[t]he present case does not involve minors."). This Court's open-ended treatment of the Due Process Clause is precisely what facilitates decisions of the lower courts such as that of the court below which are at variance with the very notion of a written constitution.

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[22] "In those days there was no king in Israel; every man did that which was right in his own eyes." Judges 21:25.

CONCLUSION

For the reasons stated herein and in the Petition, the Petition should be granted.

Respectfully submitted,

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